

6831

J. Notopoulos

PL 2

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-191647

DATE: June 26, 1978

MATTER OF: Frank Black, Jr., Incorporated

DIGEST:

1. Contracting officer's duty to notify bidder of suspected mistake was met where bidder was advised that its bid was "somewhat lower than others received," considering that contracting officer was only aware of bidder's lump-sum bid, the Government's estimate was set forth in the solicitation and the bidder was present at the bid opening and thus aware of the other bid prices. Although the Government's estimate was subsequently revised downward, failure to disclose that information to bidder does not affect validity of notification of suspected error.
2. Reformation of contract may not be granted on basis of unconscionability because circumstances do not establish that mistake was so gross that Government is "obviously getting something for nothing."

Frank Black, Jr., Inc. (Black) has alleged a mistake in bid after award of contract V101C-54 by the Veterans Administration (VA) for Project No. 595-025 to perform all work necessary to air condition various buildings at the VA Hospital, Lebanon, Pennsylvania. Black requests reformation of its contract price in the sum of \$182,723 to reflect the cost of roof-top units which Black erroneously believed was included in a supplier's quote used to calculate Black's bid price; Black learned only after award that the quote had not included these items.

The record shows that bids were opened on September 13, 1977, and that eight bids were received, ranging from Black's low bid of \$6,973,784 to a high of \$9,803,000. The second low and third low bids were \$7,490,000 and \$7,777,777, respectively.

By telegram of September 14, 1977, the VA advised Black that its bid was "somewhat lower than others received," and requested that Black verify and confirm its bid price. On September 19, 1977, the VA received a letter from Black stating that it had reviewed its proposal and confirmed its price. Black was issued an acceptance letter on October 27, 1977.

On November 9, 1977 a Black representative telephoned the VA that the bid contained a substantial mistake in the neighborhood of \$600,000.

By letter of November 23, 1977, Black modified its claim to \$182,723, and furnished affidavits alleging that it had misinterpreted its supplier's quote.

Federal Procurement Regulations (FPR) 1-2.406-3(d)(1) (1964 ed. Amend. 165) provides that whenever a contracting officer suspects that a mistake may have been made, he shall request the bidder to verify the bid. Such request shall inform why the request for verification is made, that a mistake is suspected, and the basis for such suspicion, e.g., that the bid is significantly out of line with the next low or other bids or with the Government estimate.

The thrust of Black's argument is that the verification request by the contracting officer was inadequate because it failed to convey any suspicion of error; because the contracting officer failed to reveal the Government estimate in the verification request; and because he did not make a limited investigation to learn the breakdown of Black's lump sum bid. In this regard, the protester cites numerous precedents involving instances in which the contracting officer was placed on constructive notice of an error but failed to adequately discharge his verification duties, with the result that a valid and binding contract did not come into existence notwithstanding the contractor's verification of its bid price.

In the alternative, Black requests that, if the contracting officer is found to have adequately fulfilled his obligation to detect and notify Black of the possible error in its bid, reformation be granted on the basis that it would be unconscionable to require Black to perform at its allegedly erroneous bid price because the mistake was so gross that the Government is "obviously getting something for nothing," the criterion for relief set out in prior court decisions and precedents of this Office.

Essentially, the contracting officer agrees with Black's position. He states that while he had no basis for suspecting the specific nature of the possible error in Black's bid, the verification request was "arguably ambiguous", and therefore Black's "unilateral mistake" might have been discovered at an earlier point in time had the verification request been more specific. Accordingly, he states that "it would not be equitable to enforce the contractor's unilateral mistake given the circumstances." VA agrees with the recommendation that reformation be allowed on the basis that the contracting officer's bid verification did not comply with FPR 1-2.406-3(d)(1).

We note that Black's bid consisted only of a single total price of \$6,973,784. In the absence of any breakdown in that price, we concur with the contracting officer's conclusion that a specific mistake was neither apparent nor capable of being discovered from the bid. Under such circumstances, a contracting officer's verification duty is adequately discharged when he notifies the bidder that its bid is substantially lower than other bids received and requests the bidder to verify its price. A consequential verification will result in an enforceable contract. Creative Printing, Inc., B-187441, November 12, 1976, 76-2 CPD 405; Atlas Builders, Inc., B-186959, August 30, 1976, 76-2 CPD 204.

Here, the record shows that a representative of Black was present at the bid opening, and it would appear that Black was privy to the same information (disparity in bid prices) which caused the contracting officer to request verification. See Atlas Builders,

Inc., supra. Accordingly, we do not believe the contracting officer could have informed Black of anything more with regard to the bid price disparity than Black already knew.

Emphasis is placed by VA and Black on the fact that the Government estimate of \$7,379,000 was not disclosed at the time verification was requested. However, the solicitation itself apprised bidders that the estimated cost range of the project was \$7,500,000 to \$8,500,000. Since Black was on notice of a minimum Government estimate of \$7,500,000 when it submitted its price, it appears unlikely that knowledge of the VA's subsequently revised estimate of \$7,379,000 would have indicated to Black that its bid was mistaken. See Reaction Instruments, Inc., B-189168, November 30, 1977, 77-2 CPD 424. To the contrary, we think the fact that the lower estimate narrowed the gap between Black's price and the VA's estimated cost range already imparted, might well have and logically would have instilled confidence in Black as to the validity of its price. Therefore, we do not agree that the contracting officer's verification request was inadequate under these circumstances.

Black's alternate contention is that relief should be granted on the basis that it would be unconscionable to compel performance at its mistaken price. The general rule expressed in Yankee Engineering Company, Inc., B-180573, June 19, 1974, 74-1 CPD 333, is that, notwithstanding verification of the bid, acceptance of an exceedingly low bid results in an unconscionably priced contract where the mistake in bid was so gross that it could be said that the Government "was obviously getting something for nothing." See Reaction Instruments, Inc., supra.

We have found contracts to be unconscionable where the second low bidders' prices have been 280 and 300 percent greater than the awardees' prices. See Walter Motor Truck Company, B-185385, April 22, 1976, 76-1 CPD 272, and citations therein. On the other hand, differences of 58 and 53 percent have been determined insufficient to demonstrate the unconscionability of resultant contracts. See Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD

393; Aerospace America, Inc., B-181439, July 16, 1974, and May 27, 1975, 74-2 CPD 33 and 75-1 CPD 313; Walter Motor Truck Company, supra. We have further held that where the amount of the alleged mistake is only 33 percent of the original contract price, it cannot be said that the Government is receiving something for nothing. Walter Motor Truck Company, supra.

In the instant case, the alleged mistake comprises less than 3 percent of the original contract price; Black's contract price is only 5.4 percent below the Government estimate and 6.9 percent below the second low bid. In view thereof, it cannot be concluded that the Government is getting something for nothing, and the request for relief on said basis must be denied.

In view of the foregoing, it is our conclusion that the VA's acceptance of Black's bid has resulted in a valid and binding contract, and that Black may therefore be compelled to perform at its bid price.


Deputy Comptroller General
of the United States